SUPREME COURT, U. S.

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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1973

No. 73-2068

NORMAN LUI, *Petitioner*,

vs.

UNITED STATES OF AMERICA, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI

to the United States Court of Appeals

for the Ninth Circuit

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The petitioner, Norman Lue, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered on the 19th day of June, 1974.

OPINION BELOW

The Court of Appeals entered its opinion on June 19, 1974. The opinion is not yet reported, and a copy of the opinion is attached hereto as Appendix A.

JURISDICTIONAL STATEMENT

Jurisdiction of this Court is invoked under the provisions of Section 1254 (1) of Title 28, United States Code.

QUESTION PRESENTED FOR REVIEW

Was the conviction below obtained in violation of the due process clause of the Fifth Amendment to the Constitution by virtue of the conduct of law enforcement officers in obtaining, importing and delivering contraband narcotic drugs to the petitioner?

STATEMENT OF THE CASE

The abbreviated statement of facts in the opinion below omits evidence developed during the government's case in chief bearing on the important issues of "creative activity", and the degree to which the commission of the crime was the direct result of that activity. For that reason, petitioner would ask the Court's indulgence to summarize the testimony of two prime government witnesses, Monson [the informant-special employee] and Shostrom [the agent]. Only by such a recitation can the case be put in its proper perspective, thereby exposing the unsound conclusion by the Court below that the acquisition, importation and delivery of heroin by government agents is comparable to the "scarcely objectionable" conduct in *United States v. Russell,* 411 U.S. 423 (1973).

During the trial, Lue moved for judgment of acquittal both on the grounds of entrapment as a matter of law and that the degree of participation by government agents in the instigation and commission of the crime was such that due process bars conviction. Since the *Russell* case was before this Court, the trial judge did not feel bound by the Ninth Circuit's decision in *Russell,* and both motions were denied. Petitioner was convicted by a jury and sentenced to ten years in prison. Since the issue of predisposition was found against the petitioner by the jury, on traditional entrapment instructions, the Court below found that there was evidence in the record to support the jury finding, and that there was no entrapment as a matter of law (Opinion, Appendix A).

While the petitioner does not concede in this Court or in the Courts below (as did the petitioner in *Russell, supra),* that he was in any way predisposed to commit the offense, the governmental activity in this case was so pervasive as to overcome any slight predisposition which could bar the traditional entrapment defense. For that reason, petitioner only raises in this petition for certiorari the sole question of the degree of governmental activity required to violate due process standards. Consequently, the factual setting from the government's own witnesses is of paramount importance, especially the chronology of events preceding the involvement of petitioner in the activity. For these reasons, the testimony of Monson and Shostrom will be summarized in sequential form.

March 5, 1972. Monson, a government informer, was approached by Young in Hong Kong. Young was a Chinese import-export dealer, and was acquainted with Monson. Young asked Monson if he would go into a morphine smuggling business with him, and if he would put up $3,000.00 to purchase the drugs. Monson told him he would think about it (Transcript, pp. 4-7). Monson reported this to Shostrom, a federal narcotics agent at the American Embassy in Hong Kong. Monson gave Shostrom Young's telephone number, and Monson was told to keep in touch with Young. Monson then agreed to take heroin to the United States for Young, and there was no discussion about Monson investing $3,000.00 in the venture (Tr., pp. 8-16).

March 8, 1972. Monson reported his progress to Shostrom. From March 8, 1972 until April 24, 1972, nothing happened, since Young had informed Monson that he was "waiting for some way to raise the money" (Tr., p. 22).

April 24, 1972. Monson told Young that his visa would expire, and he was leaving for Formosa. Monson left, and remained in Formosa until May 10, 1972.

May 10, 1972. After contacting Shostrom in Hong Kong, Monson left Formosa for San Francisco (Tr., p. 23).

May 26, 1972. Monson contacted the San Francisco office of the Bureau of Narcotics after receiving a letter from a friend that Young was looking for him.

It was arranged that Shostrom, the agent in Hong Kong, would pose as "Stewart" (a friend of Monson's) and contact Young (Tr., pp. 26-27, 104-107).

May 31, 1972. Shostrom contacted Young in Hong Kong, and gave Young Monson's telephone number in San Francisco, and instructed Young to call Monson. Shostrom said he would return to Hong Kong in two weeks, and would be in touch with Young (Tr., 201-202) [To add to the intrigue, one week prior to the meeting on May 31, Young went to the American Consulate in Hong Kong to furnish information concerning drug smuggling into the United States. He was interviewed by one of Shostrom's subordinates, but "no intelligence was taken from Mr. Young" (Tr., pp. 203-204).]

June 1 or 2, 1972. Monson called Young in Hong Kong and verified that "Stewart" was an associate, and that he was "a guy who could carry the deal of bringing the drugs into the United States". Young said he was still interested, but that "he still had some financial problems" (Tr., p. 34).

June 2, 1972. Monson called Shostrom and confirmed the conversation with Young.

June 5, 1972. Young contacted Shostrom, and asked him to take a package to Monson in San Francisco. Shostrom agreed (Tr., p. 206).

June 10, 1972. Shostrom called Monson in San Francisco and informed him of the meeting with Young (Tr., pp. 35, 206).

June 10-13, 1972. Monson called Young in Hong Kong and urged him to get the drugs to Shostrom before the 16th of June, and Young stated that he would try, though he still had financial problems (Tr., pp. 36, 117-118).

June 13, 1972. Shostrom met Young in Hong Kong, and informed him that he was leaving on the 16th, and would take the heroin with him. Young asked Shostrom how he was planning to smuggle the drugs into the United States, and Shostrom said "That was my business and I would not discuss it, once he gave me the heroin, I would take care of it" (Tr., pp. 208-209).

June 16, 1972. Young called Shostrom and told him that "the deal was off", and that Shostrom should stay a week. Shostrom refused, and Young told him "Well, then in this case I guess I cannot do any business with you this time. I will have to do it when you come next time". Shostrom said there would be no next time, and hung up the telephone (Tr., p. 210). Later that day, Young called Shostrom and gave him petitioner's telephone number in Los Angeles. Young told Shostrom to have Monson call Lue and tell him that "Young has just come from the airport". When Monson finally got in contact with Lue, Lue did not know what he was talking about and did not sound anxious to see him. On this initial contact with Lue, Monson testified as follows:

> Q. Mr. Monson, after this phone call of the 16th, would it be fair to say that you gave him [Lue] the signal and Lue didn't appear to understand the signal, right?

A. Exactly.

Q. You reported that he didn't seem to know what business you were talking about, did he?

A. Yes.

Q. Yes, he did not or no?

A. Yes, it seemed like he didn't know.

Q. I see. And then you expressed a desire to get together with Mr. Lue, right?

A. Yes.

Q. You wanted to see him. You wanted to keep putting this deal together, right?

A. Yes.

* * * *

Q. As a matter of fact, he didn't particularly even want to see you, right? He didn't sound like he was very anxious to see you?

A. He seemed like that, yes. (Tr., p. 126).

After this initial call, Monson called Young in Hong Kong and reported that Lue did not seem interested in talking to him. He testified:

Q. On the same day you called Mr. Young to say "What is the matter? How come this deal isn't going through", is that correct?

A. I don't know exactly the words I used, but it is on record.

Q. And you asked him what you were supposed to tell this man to participate in this venture, is that correct?

A. Yes.

Q. In other words, asking Mr. Young's advice because Mr. Lue is not falling into this trip [sic] you are setting and you want Young to tell you what you should do to snare Lue in, right?

A. Exactly.

* * * *

Q. In other words, would it be fair to say that he [Lue] was reluctant before but you kept persisting and he finally agreed that you come down to Los Angeles and talk to him?

A. Exactly. (Tr., pp. 127-128).

June 17, 1972. Monson went to Los Angeles and met Lue in a restaurant, introducing himself as a friend of Young's. Monson told him he was a gold smuggler from Hong Kong, and only "hinted" at the subject of drugs. Lue still did not appear interested in pursuing the matter, so Monson asked him to call his party in Hong Kong. Monson left and returned to San Francisco (Tr., pp. 44-48, 133-134).

June 18, 1972. Monson called Young in Hong Kong and reported that Lue did not recognize him, and that Young should clear that up. Young told Monson that the drugs were on their way, and that they had been delivered to "Stewart" for delivery (Tr., p. 50).

June 20, 1972. Monson again called Lue after learning that Lue had been trying to reach him. Lue stated that he was coming to San Francisco, and would meet Monson.

June 22, 1972. Lue met Monson on a street corner and informed Monson that he [Lue] had talked to Young, and asked Monson "how much was coming". Monson stated that Young was sending "two units", and Lue told Monson that he had never done this before, that he was not in this kind of business, and that he would have to contact somebody else (Tr., p. 59).

June 30, 1972. Monson wrote Young in Hong Kong to determine the prices and the split.

July 5, 1972. In response to Monson's letter, Young called Monson and told him to collect $7,000.00; that Monson should keep $1,250.00 and give Shostrom $1,250.00 plus $700.00 for expenses. The balance was to be sent to Young by draft (Tr., pp. 61-62).

July 7, 1972. After learning that Shostrom had arrived with the heroin, Monson made several unsuccessful attempts to contact Lue. Monson again called Young in Hong Kong "to try and get him [Young] to push Lue and get Lue into this thing" (Tr., p. 146). Finally, Monson reached Lue and arranged a meeting, telling Lue that the drugs were here and that he had to accept them, since the carrier was here and needed the money immediately. Lue informed Monson that he could not take the drugs, that he had no money, and could not raise it. Monson told Lue that he would accept $2,000.00 now, and the $5,000.00 balance later.

July 8, 1972. Monson again called Lue and asked to meet with him. Lue agreed, and they met. Monson delivered the heroin to Lue, and Lue paid the $2,000.00. Lue was later arrested at the home of a friend.

Monson testified that he came to the United States solely to pursue the drug transaction that had been proposed, since he was reluctant to return to Hong Kong in view of the gold smuggling investigation (Tr., p. 166). After discussing his cooperation with Shostrom, arrangements were made through the Amer-

ican Consul that Monson be given a visa to enter the United States to continue working on the case. Monson testified that he had no other reason to come to the United States except to work on this one case. He conceded that under his arrangement with the Bureau of Narcotics the more he produced the more he got paid (Tr., p. 167A). Monson was asked "But you also understood that if you were unable to get somebody arrested in this case, you wouldn't have completed you job?" He replied, "Well, I assume so, yes" (Tr., p. 168). From the time Monson was first contacted by Young in March 1972 until the trial of Lue in January 1973, his only employment was as an informer *in this one case,* and at the time of his testimony, he had been paid $3,700.00 for *expenses* only. His compensation, upon the successful completion of the case, "would be settled later" (Tr., pp. 105-106, 167A).

REASONS FOR GRANTING THE WRIT

The dictum of this Court in *United States v. Russell,* 411 U.S. 423 (1973) recognizing that due process may bar conviction when the conduct of the government is "outrageous" in the context of "creative activity" has been given varied interpretations by the circuits considering the question after the *Russell* decision. As suggested in the opinion below, recent decisions in the circuits have produced some speculation as to the scope of the "due process" defense, but no resolution. The question left for decision by the Court of Appeals below has not been answered by

this Court: When does governmental conduct in instigating criminal activity become "shocking", so as to bar the invocation of judicial processes to obtain a conviction?

Those post-Russell courts that have met the issue have reached inconsistent results. In *United States v. Oquendo,* 490 F.2d 161 (1974), the Fifth Circuit reaffirmed the vitality of its rationale in *United States v. Bueno,* 447 F.2d 903 (5 Cir., 1971), that entrapment as a matter of law is established whenever it is shown that "the contraband in question was supplied to the defendant by a government agent including a paid informer". 490 F.2d at p. 162. The Court distinguished this Court's holding in *Russell* on the same vital distinction present here: rather than providing the defendant with a "harmless, obtainable substance", it was the "contraband itself the possession or distribution of which constitutes the very substance of the crime". 490 F.2d at p. 163.

Similarly, the Second Circuit in *United States v. Archer,* 486 F.2d 670 (1973) [cited in the opinion below] stated that "there is certainly a limit to allowing governmental involvement in crime". 486 F.2d at p. 676. While this Court vacated and remanded the decision of the Seventh Circuit in *United States v. McGrath,* 468 F.2d 1027, vacated and remanded, 412 U.S. 936, in light of the *Russell* decision, the reasoning of the Seventh Circuit is in line with that of the Fifth Circuit in *Bueno and Oquendo, supra.* As the Court of Appeals said in *McGrath:* "[It is] repugnant to the most elemental notions of justice to

permit law enforcement personnel to manufacture counterfeit bills, deliver them and then arrest the recipient for possession of contraband." 468 F.2d at p. 1030.

The Ninth Circuit in the decision below has ignored any distinction between the supplying of contraband and a harmless substance; between entering a going criminal enterprise and being the moving party in organizing one; and the capacity of the particular defendant to commit the crime without governmental assistance.

It is essential that those limitations on governmental conduct recognized by this Court in *Russell* be clarified, if for no other reason than to define the boundaries of permissible police conduct. The decision below seems to be a "green light" to governmental participation in criminal activity, so long as the methods used do not reach the "rack and the screw" extremes of *Rochin v. California,* 342 U.S. 165 (1952). The Court below stated: "For an accused to benefit from this remedy, the facts of his case would have to demonstrate government conduct 'so outrageous' as to be analogous to the police conduct in *Rochin.*" (Opinion, Appendix A). It is doubtful that this extreme position was intended by this Court, nor even advocated by the government in *Russell.* As was recognized by the Solicitor General in *Russell:*

> We do not here challenge the proposition that under certain circumstances government participation in a criminal venture might reach a level of direction and control that would make it a violation of the due process clause to prosecute the

> people who acquiesce in what would be essentially the government's enterprise. We submit, however, that a determination of the circumstances under which such conduct is found to violate the due process clause cannot be made in a vacuum, but must be made in the context of "accepted notions of justice." See Malinski v. New York, 324 U.S. 401, 417 (Frankfurter, J., concurring). See also Rochin v. California, 342 U.S. 165, 170-171. Viewing the conduct of the undercover agent here in this light, it is plain that the isolated fact upon which the majority appeared to rest its holding—the supplying of the phenyl-2-propanone—does not justify the holding that the respondent's conviction offends "fundamental concepts of due process."
>
> * * * *
>
> It may be that due process precludes criminal conviction for engaging in conduct that would not have been possible without the participation and assistance of a government agent who supplied an indispensable means to the commission of the crime that could not have been obtained otherwise, through legal or illegal channels. But that is not what the record in this case establishes.
>
> . . .

Brief for the United States, *United States v. Russell,* No. 71-1585, October Term, 1972, pp. 27, 32.

It is interesting to note that Lue was not even drawn into the enterprise until *after* the drugs had been delivered to the government agent, Shostrom, for transportation to the United States and ultimate sale to a receiver. It was only after persistent and repeated importunings by Monson that Lue agreed to

call Young and acquiesce in accepting the drugs. In fact, it was only after Monson agreed to let Lue have $7,000.00 worth of heroin for $2,000 down that Lue was able to make the purchase. Monson freely admitted that he had to persistently keep after Lue to keep him interested, and that when he detected his continued reluctance to become involved, Monson increased his efforts. Monson's testimony that Lue told him he had never been in the drug business, and that he was not in it now, was never refuted by any evidence of prior dealings between Young and Lue (Tr., pp. 139-140). This question may have been resolved against Lue by the jury by finding some predisposition on his part to engage in the criminal venture; but it does not support any inference that Young and Lue were partners in a smuggling venture, and that the government simply provided a courier. In fact, the evidence belies this conclusion, since the details of the delivery, the price, and so forth were discussed between Young and Monson; Lue did not even know how much was coming. He had to ask Monson all the details of the transaction. The Court below analogized this situation with that in *Russell,* that the government simply provided a needed ingredient (the capacity to introduce into the United States hard narcotics through customs) that could easily have been provided by someone else. Such a finding is not only not supported by the record, it is not logically analogous to the facts in *Russell.* It would appear from a fair reading of this Court's opinion in *Russell,* that a distinction must be made between providing a government agent to obtain, smuggle and deliver a pro-

hibited narcotic drug (one that is not likely to have been produced in the United States) and furnishing a harmless chemical to an existing drug manufacturing ring. If no such distinction exists, then this Court has given the government license to play an ignoble role in the enforcement of criminal laws.

If conduct such as this is condoned, it makes a mockery of the "celebrated passage" in Mr. Justice Brandeis' dissent in *Olmstead v. United States*, 277 U.S. 438, 485:

> Decency, security, and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperilled if it fails to observe the law scrupulously. Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means—to declare that the government may commit crimes in order to secure the conviction of a private criminal—would bring terrible retribution. Against that pernicious doctrine this court should resolutely set its face.

CONCLUSION

Not only does there exist a conflict in the circuits on the interpretation of this Court's decision in *Russell*, the issue presented is one of importance in the

administration of criminal justice. Any misinterpretation of the limitations still imposed on governmental involvement by this Court's decision in *Russell* will result in a proliferation of due process problems requiring resolution by the courts, hopefully not, as below, on an *ad hoc* basis. It would be unfortunate if we were left with a rule of conduct which depended, within each circuit, on the subjective sensibilities of a majority of the panel hearing each case. There runs an undercurrent of feeling in the Courts of Appeals against excessive involvement by the government in the inducement and instigation of crime. As Chief Judge Brown stated in *Williamson v. United States,* 311 F.2d 441, 445 (5 Cir., 1962) [concurring specially], ". . . there comes a time when enough is more than enough—it is just too much. When that occurs, the law must condemn it as offensive whether the method used is refined or crude, subtle or spectacular." The question presented by this petition should be resolved. The petition for writ of certiorari should be granted.

Dated, Oakland, California,
July 16, 1974.

Respectfully submitted,
SPENCER W. STRELLIS,
STRELLIS & HALL,
Counsel for Petitioner.

(Appendix A Follows)

Appendix A

United States Court of Appeals
for the Ninth Circuit

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* vs. NORMAN LUE, *Defendant-Appellant.*	No. 73-1980 OPINION

[June 19, 1974]

Appeal from the United States District Court
for the Northern District of California

Before: DUNIWAY and WALLACE, Circuit Judges, and EAST,* District Judge.

WALLACE, Circuit Judge:

A jury convicted Lue of one count of conspiring to import heroin in violation of 21 U.S.C. § 952 and three counts of distributing heroin and possessing heroin with intent to distribute in violation of 21 U.S.C. § 841(a)(1).

He appeals asserting two errors: (1) that he was a victim of entrapment as a matter of law and (2) that the conduct of the law enforcement officers was so outrageous that his conviction constituted a denial of due process. We reject both of these contentions and affirm the judgment.

*Honorable William G. East, United States District Judge, District of Oregon, sitting by designation.

On March 5, 1972, Young Ah Jen (Young) approached Henry Monsen in Hong Kong and proposed that Monsen participate with him in smuggling morphine into the United States. After advising Young that he would "think about it," Monsen contacted the agent in charge of the Bureau of Narcotics and Dangerous Drugs in Hong Kong (Shostrom) and told him of the proposal. Monsen was instructed to keep in contact with Young; later, Monsen agreed to participate with Young in the smuggling. After May 10, when Monsen came to San Francisco Shostrom became the contact with Young in Hong Kong.

On June 5, Young asked and Shostrom agreed to take a package to Monsen in San Francisco. On June 16, Young called Shostrom and asked him to have Monsen call Lue in Los Angeles. Young had previously met Lue in Hong Kong and had offered to send heroin to Lue in the United States. Young gave Shostrom Lue's telephone number and said that Monsen should give the code phrase "Young has just come from the airport" when he spoke with Lue.

Monsen contacted Lue and repeated the phrase as directed, but Lue gave no indication he recognized the code. Monsen subsequently met with Lue in Los Angeles, at Monsen's request, and told him to "contact his party in Hong Kong." Later, on June 22, Lue contacted Monsen in San Francisco and informed him that he had talked to Young and asked Monsen "how much was coming."

After the drugs arrived in San Francisco, Monsen met Lue, delivered a bag containing the heroin and

received from him $2,000. Lue was followed by federal agents and was later arrested.

I. *ENTRAPMENT*

Lue maintains that he was the victim of entrapment as a matter of law. He claims he was unwilling to participate in narcotics smuggling but was overcome by the repeated importunings of the government agents. He also objects that the trial court instructed the jury in accordance with the traditional concept of entrapment which focuses on the accused's predisposition to commit the offense. He contends that the jury instructions should have focused on the degree of governmental activity.

In *United States v. Russell,* 411 U.S. 423 (1973), the Court reaffirmed its earlier opinions in *Sorrells v. United States,* 287 U.S. 435 (1932), and *Sherman v. United States,* 356 U.S. 369 (1958), which held that the defendant's predisposition to commit the crime was the principal element in the defense of entrapment. In *Russell,* the Court expressly overruled the conclusion reached by us that as a matter of law "a defense to a criminal charge may be founded upon an intolerable degree of governmental participation in the criminal enterprise." *United States v. Russell,* 459 F.2d 671, 673 (9th Cir. 1972), *rev'd,* 411 U.S. 423 (1973). The jury instructions[1] given by the trial court

[1]The district court instructed in part:

The defendant asserts that he was a victim of entrapment as to the crimes charged in the indictment.

Where a person has no previous intent or purpose to violate the law, but is induced or persuaded by law-enforcement officers or their agents to commit a crime, he is a victim of

were directed to the concept of predisposition and are therefore proper under the holdings of *Sorrells, Sherman* and *Russell.* The trial court committed no error by denying Lue's motions to instruct the jury in accordance with our erroneous holding in *Russell.*

We agree with Lue that this case differs from *Russell* in the degree of predisposition, but that does not call for a different result as a matter of law. In *Russell* the evidence clearly disclosed that, prior to the time of the government involvement, the defendant had actually been engaged in the criminal activity for which he was convicted. Russell even conceded in the court of appeals "that he may have harbored a predisposition to commit the charged offenses. . . ." 459 F.2d at 672. Lue, on the other hand, has persisted in contending that he had no such predisposition nor prior criminal activity. The jury, after hearing all the evidence and after proper instructions, was apparently persuaded that "the Government's deception [did not] actually implant the criminal design in the mind of the defendant. . . ." *Russell,* 411 U.S. at 436. The evidence was clearly sufficient for the jury to reach that conclusion.

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entrapment and the law as a matter of policy forbids his conviction in such a case.

On the other hand, where a person already has the readiness and willingness to break the law, the mere fact that government agents provide what appears to be a favorable opportunity is not entrapment. . . .

If, then, the jury should find beyond a reasonable doubt from the evidence in the case that, before anything at all occurred respecting the alleged offense involved in this case, the defendant was ready and willing to commit crimes such as charged in the indictment, whenever opportunity was afforded, and that government officers or their agents did no more than offer the opportunity, then the jury should find that the defendant is not a victim of entrapment.

II. *DUE PROCESS*

Lue asserts that his conviction was obtained in violation of due process because of the conduct of the law enforcement officers. His contention is apparently based upon the following language from *Russell:*

> While we may some day be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction, cf. *Rochin v. California,* 342 U.S. 165 (1952), the instant case is distinctly not of that breed.

411 U.S. at 431-32. This dictum has already produced some speculation, Comment, *The Viability of the Entrapment Defense in the Constitutional Context,* 59 Iowa L. Rev. 655, 664-69 (1974), and litigation, *United States v. Archer,* 486 F.2d 670 (2d Cir. 1973), but no resolution.[2] The *Russell* dictum implies that where the entrapment defense is unavailable to the defendant because of his predisposition, a remedy founded on due process may still be available in an extreme case.[3]

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[2]In *Archer* the defendants asserted the due process defense based on the *Russell* dictum but the Second Circuit avoided the resolution of the "uncertainties and dimensions of this defense," Comment, *The Viability of the Entrapment Defense in the Constitutional Context,* 59 Iowa L. Rev. 655, 665 (1974), and decided the case on other grounds. United States v. Archer, 486 F.2d 670, 677 (2d Cir. 1973).

[3]Unwilling to abandon the subjective test, the Court has apparently tried to augment it with a separate non-entrapment defense based on due process. This defense is centered on the theory that although the predisposition of a defendant will render the traditional entrapment defense unavailable to him, the fundamental fairness requirements of due process may prevent his prosecution.

Comment, *The Viability of the Entrapment Defense in the Constitutional Context,* 59 Iowa L. Rev. 655, 665 (1974).

Thus, the Court did close the door on the government activity theory in an entrapment case, but it left it open enough to provide proper relief when such activity violates due process. This is not an exception to entrapment law which focuses on a defendant's predisposition. It is a recognition that some government activity might be so grossly shocking to be violative of due process regardless of whether the requirements of entrapment have been met. For an accused to benefit from this remedy, the facts of his case would have to demonstrate government conduct "so outrageous" as to be analogous to the police conduct in *Rochin.*

Lue, however, attempts to thrust open completely that which was left slightly ajar by claiming the same type of government activity validated in *Russell* is now tainted under the banner of due process. In this he fails. Monsen and Shostrom were conduits in the transfer of the heroin from Young to Lue. As in *Russell,* where the government agents provided something of value in order to infiltrate the drug ring, here also the government provided something of value when it furnished the needed couriers to carry the heroin. The Court stressed in *Russell* that the defendants could have obtained the chemical ingredient supplied by the government from alternate sources and thereby achieved their criminal purpose without the assistance of the government. Similarly, if Monsen and Shostrom had not been available, someone else would have been employed by Young to carry the heroin to Lue.

In *Russell,* the Court, addressing itself to government activity similar to that involved in this case, stated:

> [I]n drug-related offenses law enforcement personnel have turned to one of the only practicable means of detection: the infiltration of drug rings and a limited participation in their unlawful present practices. Such infiltration is a recognized and permissible means of investigation; if that be so, then the supply of some item of value that the drug ring requires must, as a general rule, also be permissible. For an agent will not be taken into the confidence of the illegal entrepreneurs unless he has something of value to offer them. Law enforcement tactics such as this can hardly be said to violate "fundamental fairness" or "shocking to the universal sense of justice," *Kinsella,* [361 U.S. at 246].

411 U.S. at 432.

Just as the Supreme Court concluded in *Russell,* we also conclude in this case:

> The law enforcement conduct here stops far short of violating that "fundamental fairness, shocking to the universal sense of justice," mandated by the Due Process Clause of the Fifth Amendment. *Kinsella v. United States ex rel. Singleton,* 361 U.S. 234, 246 (1960).

411 U.S. at 432.

AFFIRMED.

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502-748—74——1

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-2063

NORMAN LUE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 498 F. 2d 531.

JURISDICTION

The judgment of the court of appeals was entered on June 19, 1974. A petition for a writ of certiorari was filed on July 22, 1974, and is therefore out of time under Rule 22(2) of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioner was entrapped into dealing in heroin under the due process standards of *United States* v. *Russell*, 411 U.S. 423.

STATEMENT

On July 27, 1972, a grand jury in the Northern District of California returned a seven-count indictment charging petitioner and two others, Young Ah Jen and Chung Hen Ho, with various narcotics offenses. Petitioner was named as a defendant in five counts. Count 1 alleged that petitioner and Young had conspired to import heroin into the United States, in violation of 21 U.S.C. 952. Count 6 alleged that petitioner had conspired with Ho to distribute heroin, in violation of 21 U.S.C. 841(a)(1). Counts 2, 3, and 7 alleged that petitioner had distributed heroin and possessed heroin with intent to distribute, in violation of 21 U.S.C. 841(a)(1). After a joint trial before a jury with co-defendant Ho,[1] petitioner was convicted on counts 1, 2, 3, and 7. The jury was unable to reach a verdict as to count 6.[2] Petitioner received concurrent sentences of ten years' imprisonment on each count. The court of appeals affirmed.

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[1] Young Ah Jen has remained outside the jurisdiction of United States law enforcement authorities.

[2] The jury acquitted co-defendant Ho on count 5, which charged him with having possessed heroin with intent to distribute, in violation of 21 U.S.C. 841(a)(1). The jury was unable to reach a verdict as to Ho's guilt or innocence under count 4, which also alleged that he had possessed heroin with intent to distribute, in violation of 21 U.S.C. 841(a)(1), and count 6.

The evidence at trial showed that in November of 1971, petitioner, who operated a poultry market in Los Angeles, traveled to Hong Kong and met Young, a Hong Kong businessman (Tr. A. 4, 7–8, 12).[3] At that time, Young told petitioner that he could send petitioner some heroin after petitioner got back to the United States. Petitioner subsequently returned to California (Tr. B. 63).[4]

In Hong Kong on the morning of March 5, 1972, Young approached one Henry Monsen, a Norwegian ship broker and gold smuggler, and asked him to participate in a "regular weekly business" of smuggling narcotics from Hong Kong to San Francisco. Young proposed that Monsen carry the drugs to San Francisco, one kilo at a time. Monsen told Young that he would consider the offer, and the two parted (Tr. A. 2, 4, 6–7, 88–89).

Immediately after leaving Young, Monsen telephoned the United States Embassy in Hong Kong and spoke with Stewart Shostrom, an agent with the Bureau of Narcotics and Dangerous Drugs (B.N.D.D.). Monsen, who had no prior dealings with United States law enforcement officers, met with Agent Shostrom later that day and told him about his encounter with Young (Tr. A. 10–12). Shostrom asked Monsen to find out more about Young and his proposal (Tr. A. 195).

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[3] "Tr. A." refers to the seven-volume transcript of all proceedings at trial except the testimony of the defendants.

[4] "Tr. B." refers to the one-volume transcript of the defendants' testimony.

Monsen continued his negotiations with Young (Tr. A. 13). Young told Monsen that he had a "reliable receiver" in the United States who was willing to pay for drugs as soon as they were delivered (Tr. A. 17). When Monsen asked who the receiver was, Young told him that it was not necessary for him to know until the drugs were available for shipment (Tr. A. 19). Monsen agreed to transport the drugs to the United States for Young if Young obtained them from his source (Tr. A. 16).

Monsen maintained daily communication with both Young and Agent Shostrom (Tr. A. 13). Young experienced financial difficulties which delayed his procuring drugs. On April 24, 1972, Monsen informed Young that his Hong Kong tourist visa expired the next day and that he had to go to Formosa for a brief period to renew it. While in Formosa, Monsen learned that his name had been linked to gold smuggling in newspapers in Hong Kong, and he decided not to return there. He telephoned Agent Shostrom from Formosa and told him that he was going to San Francisco. Monsen flew to San Francisco on May 10, 1972 (Tr. A. 22-23, 165–166).

In San Francisco, Monsen received a letter from a friend in Hong Kong which stated that Young was looking for Monsen, that Young "could get the supplies from Bangkok," and that Young wanted Monsen to contact him (Tr. A. 24, 102–104). Monsen immediately telephoned the B.N.D.D. in San Francisco, and on May 26, 1972, he met with Agent Peter Niblo (Tr. A. 26). Monsen and Agent Niblo agreed that

rather than have Monsen return to Hong Kong and receive the drugs from Young, Agent Shostrom should contact Young and tell him that he was a friend of Monsen's and would take the drugs to the United States (Tr. A. 26–27).

On May 31, 1972, Agent Shostrom telephoned Young and told him that his name was "Ken Stewart" and that he was a friend of Monsen's who had recently arrived in Hong Kong. Shostrom told Young that Monsen wanted Young to telephone him in San Francisco and gave him Monsen's telephone number. Young asked Shostrom how he could reach him and Shostrom gave him an undercover telephone number in his Hong Kong office (Tr. A. 201–202).

Monsen telephoned Young from San Francisco and told him that Ken Stewart was an "alright fellow" who "could carry the deal of bringing the drugs into the United States." Young told Monsen that Stewart was acceptable, but that he "still had some financial troubles" (Tr. A. 33–34).

On June 5, 1972, Young telephoned Shostrom and asked him to "take a package" to Monsen in San Francisco. Shostrom said that he would (Tr. A. 205–206). Young and Shostrom met in Hong Kong on June 13, 1973 and agreed that Shostrom would sail for San Francisco with a package of heroin on June 16 (Tr. A. 208–209).

On the morning of June 16, Young telephoned Shostrom and told him that "the deal was off" and that they would do business at a later date. Shostrom responded that there would be no next time and that

he did not believe that Young could get drugs. The agent hung up before Young could reply (Tr. A. 210).

Later on June 16, Young telephoned Shostrom again and told him to have Monsen telephone petitioner in Los Angeles. Young gave Shostrom the telephone number of petitioner's poultry market and told him that after Monsen called petitioner, he would be able to deliver the heroin (Tr. A. 211). Young said that Monsen should give the code phrase "Young has just come from the airport" when he spoke with petitioner (Tr. A. 211–212, 245). Shostrom, by telephone, immediately reported this conversation to Agent Niblo in San Francisco (Tr. A. 211–212, 245).

In San Francisco, acting on instructions from Agent Niblo, Monsen telephoned petitioner's poultry market in Los Angeles (Tr. A. 37). Petitioner was not in, but Monsen left his number and petitioner soon returned his call (Tr. A. 38). Monsen told petitioner that "Young had just arrived on the airline," but petitioner gave no indication whether he recognized the code. Monsen told petitioner that his friend Stewart was scheduled to leave from Hong Kong the next day and that there was some "business" from Young for them to talk about. Petitioner indicated that he would talk to Monsen in Los Angeles and Monsen said that he would be there the next day (Tr. A. 40–41, 120–124; Govt. Ex. No. 2).[5]

[5] Two reels of tape (Government Exhibits, Numbers 1 and 2), containing telephone conversations to which Monsen was a party and which were recorded with his consent by federal agents, were received in evidence (Tr. A. 441–442).

After talking with petitioner, Monsen telephoned Young in Hong Kong and told him that since petitioner had agreed to meet with him, Young could dispatch Stewart with the drugs. Young told Monsen that when he met with petitioner he should tell him to "call his party in Hong Kong" (Tr. A. 43; Govt. Ex. No. 2).

In Hong Kong, Young delivered to agent Shostrom a package containing about 1 kilo of pure heroin, and Shostrom sailed for San Francisco on June 18, 1972 (Tr. A. 212–214, 219, 224, 302, 380).

Meanwhile, Monsen had gone to Los Angeles where, on June 17, 1972, he talked with petitioner at a Chinese restaurant which petitioner had suggested as a meeting place (Tr. A. 44–46; Govt. Ex. No. 1). When Monsen mentioned Young, petitioner said that he did not know Young or anyone else in Hong Kong. Later in their conversation, however, when Monsen (in accordance with Young's instruction) suggested that petitioner "contact his party in Hong Kong," petitioner said that he would. As Monsen and petitioner parted, petitioner offered to keep in touch and Monsen gave him his undercover telephone number at the B.N.D.D. in San Francisco (Tr. A. 47–49).

On June 20, 1972, Monsen learned from Agent Niblo that petitioner had been trying to reach him at the undercover number. Monsen immediately telephoned petitioner's poultry business in Los Angeles. The person who answered said that petitioner had taken the day off. When Monsen mentioned that he was calling from San Francisco, the person said, "Oh, San Fran-

cisco. I have a number * * *. You call him now." He gave Monsen another number in Los Angeles at which Monsen was able to reach petitioner a few moments later (Tr. A. 50–53; Govt. Ex. No. 2). Petitioner told Monsen that he had spoken with Young in Hong Kong* and that as a result he would come to San Francisco and talk with Monsen (Tr. A. 54; Govt. Ex. No. 2).

Petitioner telephoned Monsen on June 22, 1972, and told him that he was in Oakland. He told Monsen that he wanted to meet him at the corner of Broadway and Polk Streets in San Francisco (Tr. 54–55; Govt. Ex. No. 2). Petitioner picked up Monsen in his car at the specified location and they drove around for half an hour. Petitioner again stated that he had spoken with Young and asked Monsen "how much was coming" and when it would arrive. Monsen told petitioner that the drugs would arrive by ship about July 10 and that Young had merely told him that there would be "two units." Petitioner remarked to Monsen that he was acting as a "broker" and "would have to contact his people." Before he dropped off Monsen, petitioner told him that he had moved to Oakland for a month and would stay in contact (Tr. A. 55, 58–60, 141).

Monsen wrote Young on June 30, 1972, asking him "to clarify the prices and the cut up of profits." Young telephoned Monsen on July 5 and told him

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*A telephone company toll statement indicating that on June 20, 1972 a person-to-person telephone call was placed from petitioner's telephone in Los Angeles to a "Mr. Young" in Hong Kong was received in evidence (Tr. A. 370–373, 470).

to collect $7,000 from petitioner. Monsen was to keep $1,250, Stewart was to get $1,250 plus $700 for expenses, and the balance was to be forwarded to Young (Tr. A. 61–62).

On July 7, 1972, after learning that Agent Shostrom had reached San Francisco with the heroin, Monsen telephoned petitioner in Oakland and told him that the "goods had arrived." When Monsen told petitioner that Young wanted $7,000 for the drugs, petitioner said that he did not have that much money and would have to talk to his people. Petitioner told Monsen that he would call him at 10:00 p.m. (Tr. A. 64–65, 144, 148; Govt. Ex. No. 2).

Because of a mistake at the B.N.D.D. office in San Francisco, petitioner heard a recorded announcement that the number had been changed when he attempted to call Monsen back at the undercover number. When Monsen did not receive petitioner's call, he telephoned petitioner in Oakland (Tr. A. 253–254). Petitioner told Monsen that he had been trying unsuccessfully to reach him and that he wanted to see him that evening. They agreed to meet at Polk and Broadway at 11:00 p.m. (Tr. A. 65–66; Govt. Ex. No. 2).

Federal agents gave Monsen a black valise containing 10 grams of the heroin that Agent Shostrom had brought from Hong Kong mixed with more than 800 grams of soap powder, and Monsen proceeded to the appointed intersection, where petitioner picked him up in his car (Tr. A. 66–67, 254–255, 378–379). As they drove, Monsen told petitioner that the carrier was there and needed the money immediately and

that petitioner could pay $2,000 the next day (Saturday, July 8) and the balance on Monday. They agreed to meet at 1:00 p.m. the following day in Oakland at 7th and Alice Streets. Monsen kept the valise and its contents (Tr. A. 67–69).

The next day, July 8, 1972, petitioner picked up Monsen in his car at the designated time and place. Monsen handed petitioner the valise containing the soap and heroin mixture, and petitioner gave him $2,000 (Tr. A. 70–72). After dropping off Monsen, petitioner drove to his apartment at 81 Vernon Street in Oakland; he was followed by federal agents in a patrol car. The agents saw petitioner enter the residence carrying the valise, and they undertook a surveillance (Tr. A. 72, 258, 303).

Almost three hours later, the agents saw petitioner leave his apartment carrying a brown shopping bag and drive away. They followed him to co-defendant Ho's apartment at 728 Filbert Street in San Francisco. There the agents knocked on the door and when petitioner opened it, they placed him under arrest.[7] As the agents took petitioner into custody, they seized a small open packet containing heroin mixed with soap that lay on a nearby table (Tr. A. 259–267, 281, 384).

Later on July 8, the agents searched the premises at 728 Filbert and 81 Vernon pursuant to search warrants. At 728 Filbert they found a brown shopping bag containing a mixture of soap and heroin equal to

[7] Co-defendant Ho was arrested outside his apartment a few minutes later (Tr. A. 209).

about half of the quantity that Monsen had given petitioner earlier that day (Tr. A. 270, 301, 304–307, 388). At 81 Vernon the agents seized the black valise, the balance of the soap-heroin mixture, and a packet containing 8.6 grams of pure heroin (Tr. A. 329–341, 390–391).

Petitioner testified in his own behalf that when Monsen first told him that he had some business for him from Young, he had thought that Monsen was talking about bringing a Chinese opera to perform in the United States (Tr. B. 11). According to petitioner, when Monsen mentioned smuggling drugs, he told Monsen that he wanted no part of any illegal enterprise (Tr. B. 14). Petitioner testified that when he tried to call Young in Hong Kong to tell him not to send him any drugs, the person who answered told him that Young was not there, that the heroin had already been shipped, and that he had to buy it (Tr. B. 16–19). Petitioner further testified that he eventually purchased the heroin because Monsen looked like a gangster and he feared that Monsen might kill him (Tr. B. 22). He conceded, however, that Monsen never threatened him (Tr. B. 42). Petitioner admitted that after he received the heroin mixture from Monsen, he repackaged it in small envelopes which he intended to sell for $200 each. He also admitted that he had carried the heroin to Ho's apartment with the intention of selling some to Ho (Tr. B. 80–83). Petitioner claimed that the 8.6 grams of pure heroin that agents found in his apartment had been smuggled from Mexico by him exclusively for his personal use—which he

estimated at fourteen times a year.[8] He stated that he had smuggled heroin from Mexico—always for his own use—"three or four times" (Tr. B. 68–72).

ARGUMENT

Petitioner contends that his conviction should be reversed on the ground that he was a victim of entrapment by federal officers. He alleges that government agents initiated the heroin smuggling scheme and that their conduct was so outrageous that his conviction constituted a denial of due process under the standards of *United States* v. *Russell*, 411 U.S. 423, 430–432.

1. Petitioner's assertions notwithstanding, the heroin smuggling enterprise originated with him and Young—not with government agents. The smuggling ring had already been formed when law enforcement officers entered the picture. As detailed above, petitioner and Young had met in Hong Kong in November, 1971 and discussed the shipment of heroin to petitioner in the United States. The following March, Young approached Monsen, who at that time had no connection with the government, and asked him to participate in a "regular weekly business" of smuggling narcotics to this country from Hong Kong. Young told Monsen that he already had a "reliable receiver" in the United States whose identity he would not divulge before it was necessary. Eventually, of course, Young revealed that petitioner was that receiver.

[8] A government expert testified that 8.6 grams of pure heroin was enough for 170 typical individual daily doses of the drug (Tr. A. 417).

It was not until after Young had invited Monsen to participate in the smuggling operation that Monsen went to government agents and volunteered to cooperate with them. Monsen maintained contact with Young, who, despite financial difficulties, showed continuing eagerness for Monsen to transport drugs. When circumstances led Monsen to move to San Francisco, his participation in the ring seemed in doubt. However, Young kept Monsen in the operation by having word sent to Monsen that he could get drugs and that Monsen should contact him. Rather than have Monsen return to Hong Kong, Agent Shostrom, posing as Stewart, contacted Young in Hong Kong. At Young's request, Shostrom brought the heroin to San Francisco, where Monsen delivered it to petitioner.

In *United States* v. *Russell, supra,* this Court upheld a defendant's conviction for manufacturing illicit amphetamines even though an undercover government agent had provided an essential chemical ingredient. As the Court noted there, in order to obtain convictions where organized drug rings are involved, law enforcement officers must sometimes infiltrate the criminal organizations and participate to some extent in their unlawful activities. 411 U.S. at 432.

> Such infiltration is a recognized and permissible means of investigation; if that be so, then the supply of some item of value that the drug ring requires must, as a general rule, also be permissible. For an agent will not be taken into the confidence of the illegal entrepreneurs unless he has something of value to offer them. Law enforcement tactics such as this can hardly

> be said to violate "fundamental fairness" or "shocking to the universal sense of justice," *Kinsella* [v. *United States ex rel. Singleton*, 361 U.S. 234, 246]. [411 U.S. at 432.]

Here, as in *Russell*, the government agents provided something of value to the illegal entrepreneurs in order to infiltrate the drug ring. Specifically, the government furnished couriers to carry the heroin (which Young had obtained from his own source in Hong Kong) to petitioner in the United States for distribution. This Court stressed in *Russell* that although the chemical ingredient supplied by the government agent was scarce, the defendants could have obtained it from alternate sources and achieved their criminal purpose without the agent's assistance. Similarly, as the court of appeals held here, if Monsen and Shostrom had been unavailable, Young would simply have employed someone else to carry the heroin to petitioner (Pet. App. A, p. vi).

As noted, co-defendant Young, not Monsen or Shostrom, provided the heroin for petitioner. This contrasts with the situation in *United States* v. *Oquendo*, 490 F.2d 161 (C.A. 5), relied on by petitioner (Pet. 11), where it was alleged that a government informant was the source of heroin which the defendant was convicted of distributing.[9] Here, Monsen and Shostrom were mere conduits in transferring the heroin from

[9] Moreover, the decision in *Oquendo* was based upon the Fifth Circuit's earlier opinion in *United States* v. *Bueno*, 447 F.2d 903, which may well not be good law in light of this Court's opinion in *Russell*. See *United States* v. *Oquendo*, *supra*, 490 F.2d at 166–167 (Gee, J., concurring).

its illicit source to petitioner. Such conduct has repeatedly been recognized as a proper investigatory tactic. See, *e.g., United States* v. *Ortega,* 471 F.2d 1350 (C.A. 2), certiorari denied, 411 U.S. 948; *Chapman* v. *United States,* 443 F.2d 917 (C.A. 10); *United States* v. *Beckley,* 335 F.2d 86 (C.A. 6), certiorari denied *sub nom. Stone* v. *United States,* 380 U.S. 922; *United States* v. *Davis,* 272 F.2d 149 (C.A. 7); *United States* v. *Sohnen,* 298 F. Supp. 51 (E.D.N.Y.).

In sum, "[t]he law enforcement conduct here stops far short of violating that 'fundamental fairness, shocking to the universal sense of justice', mandated by the Due Process Clause of the Fifth Amendment." *United States* v. *Russell, supra,* 411 U.S. at 432.

2. While petitioner purports only to raise the due process issue, implicit in his petition is a contention that he was entrapped as a matter of law under traditional standards, a claim which was rejected by the court of appeals (Pet. App. A, pp. iii–iv).

In determining whether a defendant has been entrapped, "a line must be drawn between the trap for the unwary innocent and the trap for the unwary criminal." *Sherman* v. *United States,* 356 U.S. 369, 372. Here, petitioner was not an innocent person whom Monsen led astray. Petitioner's initial hesitancy about doing business with Monsen apparently arose from his uncertainty as to whether Monsen was an actual narcotics smuggler, not from any reluctance to break the law. Moreover, the "principal element in the defense of entrapment [is] the defendant's predisposition to commit the crime." *United States* v. *Russell, supra,* 411 U.S. at 433. Petitioner asserts that there

was no evidence from which the jury could infer such a predisposition on his part.[10] However, as the court of appeals held (Pet. App. A, p. iv), the record belies that contention.

Petitioner agreed to meet in Los Angeles with Monsen, a total stranger, after Monsen began a long distance telephone conversation with the seemingly bizarre remark that "Young has just arrived on the airline." At their Los Angeles meeting, petitioner proceeded circumspectly, since he was still uncertain whether Monsen was a genuine narcotics smuggler or an undercover government agent. However, when petitioner telephoned Young in Hong Kong, his doubts were allayed and his attitude towards Monsen changed markedly. Now he was eager to do business. Petitioner tried unsuccessfully to contact Monsen by telephone in San Francisco. When Monsen called back, petitioner had gone to the trouble of leaving another number where Monsen could reach him if he called. Petitioner told Monsen over the phone that he wanted to come to San Francisco and talk with him. Peti-

[10] The trial court instructed the jury (Tr. A. 850) in instructions approved by the court of appeals (Pet. App. A, pp. iii–iv, n. 1):

"The defendant asserts that he was a victim of entrapment as to the crimes charged in the indictment.

"Where a person has no previous intent or purpose to violate the law, but is induced or persuaded by law-enforcement officers or their agents to commit a crime, he is a victim of entrapment and the law as a matter of policy forbids his conviction in such a case.

"On the other hand, where a person already has the readiness and willingness to break the law, the mere fact that government agents provide what appears to be a favorable opportunity is not entrapment."

tioner set up a meeting in San Francisco at which he eagerly asked Monsen how much heroin was coming and when it would arrive. Ultimately, petitioner agreed to pay the sizable sum of $7,000 and took delivery of the narcotics.

These were the actions of an experienced professional narcotics dealer—not those of an innocent citizen seduced into criminal activity. Once petitioner thought that he could trust Monsen, he joined enthusiastically in the conspiracy. At no time did petitioner tell Monsen that he wanted nothing more to do with him; neither did he go to the police.

Petitioner's predisposition to commit the offense was further demonstrated by the knowledgeable manner in which he packed the heroin in small envelopes for resale as soon as he received it. His admission that he previously had smuggled heroin "three or four times" was additional evidence of predisposition.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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